ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(1)(A)	)	**CC Docket No. 96-187**
of the Telecommunications Act of 1996	)	

REPLY COMMENTS OF AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION ("ACTA")

Preliminary Statement

Having reviewed many of the comments submitted in this proceeding, it is clear that an independent observer would conclude that the comments follow predictable industry positions. The monopoly LECs ("MLECs"), in the name of competition and/or deregulation, seek to shed any oversight of their tariffing practices. In turn, the MLECs then seek to be immunized from any liability for their actions, however unlawful from the start.[1] Those entities that would bear the brunt of such policy determinations should they be made, clearly oppose such uneven results.[2]

In making its determinations from this record, America's Carriers Telecommunication Association ("ACTA") submits that common sense, basic fairness and the clearly applicable principles of statutory construction require the Commission to promptly and emphatically reject the MLECs' positions with finality. In addition, ACTA submits that in rendering its decisions, it is

[1] See e.g., Comments of Bell Atlantic, NYNEX and SWBT.

[2] See e.g., Comments of AT&T and the Ad Hoc Telecommunications Users Group.

incumbent for the Commission to state with clarity that the MLEC tariffing process under consideration represents a process governing monopoly carriers.[3] These are the same monopolies moreover, which by their repudiation of the Commission's Interconnection Order, have demonstrated their overt commitment to the preservation of their monopoly control of local exchange facilities while feigning the embrace of competition believing that such chicanery will allow them to slither into the interexchange market under § 271 of the 1996 Act.[4]

ACTA's reply comments are also to be understood as asserting the rights of small businesses and carriers under the Regulatory Flexibility Act. That is, the policies adopted in regard to the processes by which MLECs' tariffs are to judged must be determined with due recognition given to the effect such new policies will have on the rights of small businesses and carriers.

"Deemed Lawful" Standard
(Section III of NPRM)

SWBT and NYNEX, two of the MLECs, argue that "deemed lawful" means that LEC tariffs were meant by Congress to be accorded the same legal status as tariffs which have been approved only after the exercise of a regulatory deliberative process.[5] To support their thesis, reliance is sought in dictionary definitions. SWBT chose to paraphrase Black's Law Dictionary.[6] NYNEX at

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[3] There should be no ambiguity in the record that the decisions made affect monopoly carriers and their tariffs. For, in ACTA's view, to explicitly state that the Commission recognizes that it must interpret the 1996 Act based on this overriding fact, destroys any semblance of rationality in considering adoption of the MLECs' positions asserted in this proceeding.

[4] See, generally, First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Iowa Utilities Board v. F.C.C., No. 96-3321 (8th Cir. 1996) and consolidated cases.

[5] SWBT @ 1-5; NYNEX @ 8-12.

[6] SWBT @ 4-5.

least gave a more complete quotation.[7] These MLECs' arguments based on the definition of "deem" are wholly unimpressive. First, their arguments simply choose to ignore the contrariety inherent in the very definition they cite. "Deem" may mean both a conditional presumption or a definite determination. The MLECs clearly chose to rely on the definite determination because it supports their position. But, in doing so, they actually undercut the merit of their own argument.

For the MLECs to prevail, "deemed" must represent a determination of lawfulness - "deem" defined as "to adjudge . . . to determine."[8] But for a "determination" to be made, a cognitive process must be involved and must precede the determination being made. That cognitive process must moreover involve the consideration and deliberation of all substantive facts, law, policies and precedents applicable or which may be applicable to the particular tariff filing being considered. The analogue is clearly the type of proceeding the Commission and other agencies follow when in fact prescribing a rate and not the truncated tariff review process used to determine whether a tariff may be suspended and investigated (a procedure which clearly identifies the fact that a final determination of lawfulness cannot be made based on the pleadings seeking suspension, but which requires further investigation).

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[7] NYNEX @ 10. AT&T's Comments provide a sound rebuttal to the lack of help resort to dictionary definitions of the word "deem" provide. AT&T @ 6, footnote 13.

[8] To "adjudge" means in essence to "adjudicate," the act of a court declaring an ascertained fact; to "determine" means " to fix or decide causally, to find out exactly something previously unknown or uncertain by observation, calculation," to make a determination, itself defined as a "finding out the exact amount or kind, by weighing, measuring, or calculating." The World Book Encyclopedia Dictionary (1972). Whatever the debate over semantics, the fact is that Congress cannot be construed to have so tilted the substantive playing field in favor of monopoly LECs and thereby overthrow, in the name of procedural efficiency the delicate balance of user and carrier rights in the tariffing process. See also AT&T Comments at 6-7.

This doesn't happen under the 1996 Act's use of the terms "deemed lawful." The only time these terms can apply is at the moment the tariff is duly filed with the Commission. Upon filing the tariff is to be deemed lawful. This necessarily means that no cognitive process has or could have yet taken place at that moment. Moreover, it is clear Congress recognized this obvious fact because it neither repealed the 120 day deferral procedures contained in section 203, nor explicitly directed the Commission to declare or otherwise act to establish a tariff as being the adjudicated "legal" rate or tariff once the truncated review process of these streamlined filings was concluded. Rather, Congress resided broad discretion in the Commission by simply requiring it to take what actions the Commission deems appropriate.

Similarly, the MLECs' interpretation of this statutory provision on whether Congress intended to include "new services" within its streamlined procedures is unpersuasive. The simple answer here is that, had Congress intended such a result it would have said so by simply including in the language "new services." Instead, Congress alliterated specific tariff components, meaning that when things in a tariff are to be changed, they should be permitted to be changed in a streamlined procedure. However, there's nothing to indicate that Congress intended that the public interest determinations of unforeseen and unforeseeable new services be similarly treated.

An example here may be Internet access services. Such service is clearly new and implicates unreviewed issues affecting the public interest, including for example, premature entry into the interexchange market; and the provisioning of a subsidized service which some MLECs have themselves demonstrated impose unrecovered costs on their operations. Congress intended no such situation to be established, whereby MLECs could tariff a new service which without any prior

knowledge or experience is to be considered a lawful service irrespective of its impact upon the public.[9]

Finally, the Commission must apply the established principle of statutory construction that the enumeration of specifics necessarily excludes adding more specifics by implication.[10]

The MLECs' position on the meaning of "deemed lawful" also raises constitutional concerns. If, as argued, MLECs may tariff new rates, terms and conditions or new services and, absent a determination to suspend or reject, such new tariffs become an unadjudicated "legal" rate immunizing the MLECs from damages upon subsequent determination of unlawfulness, those damaged by such unlawfulness will be denied their rights to procedural due process, i.e., not to have their property taken without due process of law and would also be denied equal protection of the law.

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[9] If the MLECs' arguments prevail, i.e., that Congress did so intend, it would appear that all that would be accomplished would be an increase in delays by forcing the Commission to reject or suspend any new service on the basis of the necessity to obtain a handle on what impact such new service may have on the public interests, a procedural option the Commission has under the streamlined procedures adopted.

[10] Consider particularly these two tenets of statutory construction:

> *Expressio Unis Est Exclusio Alterius* - Expression of one thing is the exclusion of another. Mention of one thing implies the exclusion of another. When certain persons or things are specified in a law, contract or will, an intention to exclude all others from its operation may be inferred. Under this maxim, if statute specifies one exception to a general rule or assumes to specify effects of a certain provision, other exceptions or effects are excluded. Black's Law Dictionary at 692 (1968).
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> *Expressum Facit Cessare Tacitum* - That which is expressed makes that which is implied cease, that is, supersedes it, or controls its effect. Where a law sets down plainly its whole meaning the court is prevented from making it mean what the court pleases. Id.

The Commission should begin its rejection of the MLECs' extremely self-serving assertions with the age old proposition that a wrongdoer is not to benefit from its wrongdoing. But, that is exactly what would occur if the MLECs position were to be adopted. Tariffs have the force and effect of law. By tariffing an unlawful rate, term or condition, whose effects cannot be determined within the truncated time period provided, the MLEC will be able to put competitors out of business and to impose on the using public any arbitrary rate, term or condition they please. While the proceedings went through the Commission processes, the MLECs could reap supra competitive profits which they would be entitled to keep, at the same time having denied users their property (the money paid for unlawful charges, or the denial of service by unlawful conditions). Congress did not intend to invoke the wrath of the consuming public to such degree and even if it did, it may not constitutionally do so.[11]

Further, ACTA finds the assertions of some MLECs', about the lack of participation of small entities in the tariff process, without merit.[12] ACTA realizes that it must be difficult for multi-billion dollar monopolies gained through the beneficence of government edicts all these years to appreciate the realities faced by small businesses attempting to compete in a monopoly-based marketplace just beginning its uncertain and unpredictable transition to a "competitive" marketplace. The MLECs' emphasis on Congress' intent to install a deregulatory framework ignores that Congress also clearly intended to provide for the participation of small businesses in that deregulated environment. Thus,

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[11] See also the Comments of the Ad Hoc Telecommunications User Committee at 3.

[12] See Comments of SWBT at 14 - "Parties that traditionally intervene in LEC tariff proceedings are not usually small entities. These companies, like MCI, AT&T, and Sprint, and carrier associations like ALTS, have their own in-house legal and tariff analysis staffs that are entirely capable of determining the impact of a filing on them, or of performing their own legal analysis if they determine it to be necessary."

by stripping away many of the old slow and tedious procedures, Congress did not intend to revoke all limits on the MLECs' actions.

The Commission should consider at least the following two ramifications of having to balance Congressional intent to deregulate and at the same time to permit small business entry and participation in the telecommunications marketplace. First, the reason that small carriers do not participate more often in the tariffing process is due precisely to their lack of resources to do so. It is not, as suggested by SWBT, that small entities have no interest, nor are unconcerned about the impact of MLEC tariff filings. Second, Congress did not revoke the Commission's role or obligation to act on its own initiative on behalf of the interests represented by the small carriers and users against the well-heeled advocacy of the MLECs. That is, the Commission retains its full authority to take action against a streamlined tariff if it perceives a public interest reason to do so, irrespective of whether or not any small entity files an opposition.

Under the new standards of the Regulatory Flexibility Act ("RFA"), it is also incumbent on this Commission to consider the impact on small businesses of the regulations it adopts on small businesses. Congress clearly expressed its view that truncated, streamlined processes were to be used to achieve deregulatory ends. At the same time, Congress did not intend that the Commission was bound to effect those ends consistent with imposing no, or the least bothersome, burdens on the MLECs, at least while their monopolies remain in place. To permit small businesses and their representatives to have some opportunity to evaluate the impact of tariffs filed, the electronic posting of tariffs and the use of summaries, listings of changes, description of customer impact and legal

analysis are minimally required and the Commission should adopt them.[13] Conversely, denying any semblance of prenotification of tariff filings and changes denies small businesses any opportunity to evaluate the impact of such filings on their businesses. The lack of any prenotification obligations on the MLECs then would impact small businesses both by gravely increasing their costs to participate in opposing unlawful LEC tariff filings, to the point of total exclusion in the process, and also their costs incurred at the point of impact, when the tariffs take effect and the small businesses are forced to comply with their terms. The Commission cannot square its obligations under either the 1996 Act or the RFA with such results.

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[13] ACTA also fully endorses the Comments of McLeod Telemanagement, Inc., particularly its comments at 5-7.

Conclusions

The Commission must avoid adoption of policies in interpreting Section 402(b)(1)(A) of the 1996 Act so as to deny IXCs, small businesses and other end users their equal protection under the laws, their rights to both procedural due process and to retain their property against destruction by unlawful conduct of monopoly enterprises. It must adopt cost effective electronic tariff filings and impose reasonable prenotification obligations on the MLECs. It must also eschew any leanings to engage, in this proceeding or any other, in detariffing or forbearance for the MLECs or any other carrier.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Suzanne M. Helein, a secretary in the law offices of Helein & Associates, P.C., do hereby state and affirm that I have caused copies of the "Reply Comments of America's Carriers Telecommunication Association," in CC Docket No. 96-187, to be served via first class mail, this 24th day of October, 1996, upon the following:

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